### Chapter VIII.

#### THE ELECTORS AND APPORTIONMENT.

- 1. Constitution and laws relating to electors. Sections 297-300.1
- 2. Constitution and laws relating to apportionment. Sections 301-304.
- 3. Bills relating to census and apportionment, privileged. Sections 305-308.
- 4. Failure of States to apportion. Sections 309, 310.2
- 5. Filling of vacancies in rearranged districts. Sections 311, 312.
- 6. Right of the State to change districts. Section 313.
- 7. Claims of States to representation in excess of apportionment. Sections 314-319.

297. The electors choosing Members of the House must have the qualifications requisite for electors of the most numerous branch of the State legislature.

The House is composed of Members chosen every second year by the people of the several States.

Section 2 of Article I of the Constitution provides:

The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

298. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.—Section 1 of Article XIV of the Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>&</sup>lt;sup>1</sup>Rare instances of rejection of votes of persons qualified under the suffrage laws of the State. (Sec. 451 of this volume and 865 of Vol. II.) Refusal of the House to follow this precedent. (Sec. 879 of Vol. II.)

 $<sup>^2\,\</sup>mbox{As}$  to technical defects in establishment of a district. (Sec. 911 of Vol. II.)

299. The rights of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude.—The fifteenth amendment to the Constitution provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

300. The right of soldiers, sailors, and marines to exercise the privilege of suffrage is not abridged by Federal law.—Section 5532 of the Revised Statutes, dating from February 25, 1865, provides:

Every person convicted of any of the offenses specified in the five preceding sections [of the Revised Statutes] shall, in addition to the punishments therein severally prescribed, be disqualified from holding any office of honor, profit, or trust under the United States; but nothing in those sections shall be construed to prevent any officer, soldier, sailor, or marine from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote.

301. The Constitution provides that Representatives shall be apportioned among the several States according to their respective numbers, excluding Indians not taxed.

The reduction of its representation is the penalty for a denial of the right to vote by a State.

No penalty is fixed for a denial of the right of suffrage because of rebellion or other crimes.

The enumeration to fix the basis of representation is to be made once in every ten years.

The number of Representatives may not exceed one for every thirty thousand inhabitants, but each State shall have at least one Representative.

 $^1$ On February 24, 1881 (third session Forty-sixth Congress, Record, pp. 2020–2023), in the House Nathaniel J. Hammond, of Georgia, discussed suffrage with reference to the fourteenth and fifteenth amendments, and with references to the decisions in the cases of Minor v. Happersett (21 Wallace, R.) and United States v. Reese (92 U. S., 214) and Cole's case.

The subjects of the thirteenth, fourteenth, and fifteenth amendments to the Constitution were discussed elaborately in the Senate in 1879 on a resolution introduced by Mr. George F. Edmunds, of Vermont. (Third session Forty-fifth Congress.)

On January 30, 1879, Mr. Morgan, of Alabama, discussed with Mr. Edmunds the question of citizenship under the Constitution. (Record, p. 847.) Also question of suffrage (Record, pp. 847–957) and the power of Congress over voting at State elections (p. 848) and to punish in cases where right to vote is denied on account of race, color, etc. (p. 885); on Federal election laws to protect suffrage and the respect in which they had failed (pp. 958, 959) through rulings of the Supreme Court; as to qualifications of voters and fixing the times, places, and manner (pp. 960, 961, 997); times, places, and manner (pp. 997, 998, 999); Messrs. Edmunds and Whyte discussed the power of Congress to provide penalties for violation of laws as to time, place, and manner (pp. 999). Mr. Whyte's history of Congress's interference as to time, place, and manner, beginning with 1842 (pp. 999). Discussion by Messrs. Edmunds and Whyte as to the constitutionality of the act of July 14, 1870, by which supervisors of election were appointed (pp. 1000). Resolutions of Messrs. Edmunds and Morgan as to voters of the States and voters of the United States (pp. 342, 567).

The Supreme Court has also discussed the fifteenth amendment in several decisions.

# The first apportionment was fixed by the Constitution. References to discussions of questions relating to apportionment. The distribution of representation under the several apportionments. Section 2 of Article XIV of the Constitution provides—

Representatives shall be apportioned among the several States according to their respective numbers,¹ counting the whole number of persons² in each State, excluding Indians not taxed.³ But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

 $^{1}$ The various apportionments, including the first one made in the Constitution itself, have been as follows:

States.	1787.	1790.	1800.	1810.	1820.	1830.	1840.	1850.	1860.	1870.	1880.	1890.	1900.
Maine New Hampshire Massachusetts Rhode Island Connecticut Vermont New York New Jersey Pennsylvania Delaware Maryland Virginia North Carolina South Carolina Georgia Kentucky Tennessee Ohio Louisiana Indiana Mississippi Illinois Alabama Missouri Arkansas Michigan Florida Iowa Iowa Texas Wisconsin California Minesota Oregon Kansas West Virginia Mevada Nebraska Nebraska Nebraska Nestaska Ne	3 8 8 1 5 5 6 6 4 4 8 8 1 1 6 5 5 5 3 3	4 14 14 22 7 7 2 110 5 3 3 1 1 8 8 199 110 6 2 2 2 2	5 177 2 2 7 7 4 4 177 6 6 188 1 1 9 222 122 8 8 4 4 6 6 3 3	6 200 2 2 7 7 6 6 27 6 23 2 3 2 3 13 3 9 9 6 6 10 6 6 6	7 6 6 13 3 2 2 6 6 5 5 34 4 6 6 5 5 9 9 22 2 13 3 3 1 1 1 2 2 1 1	8 5 5 12 2 2 6 6 5 40 40 6 6 5 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	7 4 4 100 2 2 4 4 4 4 4 4 5 5 4 4 1 1 6 6 1 5 5 9 9 7 7 8 8 100 11 1 2 1 1 4 4 1 1 0 0 4 4 7 7 7 5 5 1 1 3 3 2 2	6 3 3 11 1 2 4 4 3 3 33 5 5 1 6 6 13 8 6 6 8 8 10 10 21 1 1 5 9 9 7 7 7 7 2 2 4 4 1 1 2 2 4 4 3 3 2 2	5 2 2 2 4 3 3 311 5 5 111 7 7 7 9 9 8 8 9 11 1 5 14 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6	5 3 3 11 1 2 4 4 3 3 333 7 7 1 6 6 9 9 8 8 5 5 9 9 10 100 200 6 6 193 8 4 4 9 9 2 2 9 9 111 8 4 3 3 3 1 1 1 1 1	4 2 2 2 2 4 4 2 2 3 3 4 7 8 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	4 2 2 2 2 1 3 3 4 4 8 8 8 8 3 0 1 1 6 6 1 2 2 1 1 1 1 1 1 1 1 1 1 1 1 1	14 22 14 25 237 10 32 16 610 10 10 11 11 11 11 11 11 18 92 28 11 11 11 18 18 19 19 19 19 19 19 19 19 19 19 19 19 19
Total	63	105	141	181	212	240	223	234	241	293	325	357	391

<sup>&</sup>lt;sup>a</sup>Oklahoma has since been admitted with five Representatives. (34 Stat. L., p. 271.)

<sup>&</sup>lt;sup>2</sup>The Constitution also provides for ascertaining this number of persons by a census every ten years. The last census was taken in 1900.

302. The apportionment of Representatives to the several States under the act of 1901.

From March 3, 1903, the membership of the House was fixed at 386. The representation of a newly admitted State is in addition to the total number of Representatives fixed by the act of 1901.

The act of January 16, 1901, made the following provisions as to apportionment:

That after the third day of March, nineteen hundred and three, the House of Representatives shall be composed of three hundred and eighty-six members, to be apportioned among the several States as follows: Alabama, nine; Arkansas, seven; California, eight; Colorado, three; Connecticut, five; Delaware, one; Florida, three; Georgia, eleven; Idaho, one; Illinois, twenty-five; Indiana, thirteen; Iowa, eleven; Kansas, eight; Kentucky, eleven; Louisiana, seven; Maine, four; Maryland, six; Massachusetts, fourteen; Michigan, twelve; Minnesota, nine; Mississippi, eight; Missouri, sixteen; Montana, one; Nebraska, six; Nevada, one; New Hampshire, two; New Jersey, ten; New York, thirty-seven; North Carolina, ten; North Dakota, two; Ohio, twenty-one; Oregon, two; Pennsylvania, thirty-two; Rhode Island, two; South Carolina, seven; South Dakota, two; Tennessee, ten; Texas, sixteen; Utah, one; Vermont, two; Virginia, ten; Washington, three; West Virginia, five; Wisconsin, eleven; and Wyoming, one.

SEC. 2. That whenever a new State is admitted to the Union the Representative or Representatives assigned to it shall be in addition to the number three hundred and eighty-six.<sup>2</sup>

303. The apportionment act provides that Representatives shall be elected in districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.

The districts in a State shall be equal to the number of its Representatives, no one district electing more than one Representative.

The act of January 16, 1901,<sup>1</sup> in providing for the apportionment, has the following:

SEC. 3. That in each State entitled under this apportionment, the number to which such State may be entitled in the Fifty-eighth and each subsequent Congress shall be elected by districts composed

<sup>3</sup> Section 2 of Article I of the Constitution provided originally for the apportionment, but a portion of it has been superseded by section 2 of Article XIV. Section 2 of Article I is as follows, with the portion which has been superseded indicated by brackets:

[Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

On May 3, 1832 (first session Twenty-second Congress, Report No. 463), the conferees made a report of disagreement between the House and Senate as to an apportionment bill, which reviewed at length the proceedings as to prior apportionments. Later reports have also made reviews of this nature, notably House Report No. 2130, second session Fifty-sixth Congress.

<sup>&</sup>lt;sup>1</sup>31 Stat. L., pp. 733, 734.

 $<sup>^2</sup>$  Thus, Oklahoma has been admitted by act of June 16, 1906, with five Members additional to the number provided in this act.

of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of the Representatives to which such State may be entitled in Congress, no one district electing more than one Representative.

Provisions similar, but not identical, are found in previous apportionment acts. 304. The apportionment of 1901 provided for the election of Representatives in old districts and at large until the respective States should have rearranged the districts.—The act of January 16, 1901, in providing for the apportionment, has the following:

SEC. 4. That in case of an increase in the number of Representatives which may be given to any State under this apportionment such additional Representative or Representatives shall be elected by the State at large, and the other Representatives by the districts now prescribed by law until the legislature of such State, in the manner herein prescribed, shall redistrict such State; and if there be no increase in the number of Representatives from a State the Representatives thereof shall be elected from the districts now prescribed by law until such State be redistricted as herein prescribed by the legislature of said State; and if the number hereby provided for shall in any State be less than it was before the change hereby made, then the whole number to such State hereby provided for shall be elected at large, unless the legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein.

Provisions similar, but not identical, are found in previous apportionment acts. 305. A legislative proposition, presented in obedience to a mandatory provision of the Constitution, was held to involve a question of privilege.— On January 3, 1901,<sup>2</sup> Mr. Marlin E. Olmstead, of Pennsylvania, presented, as involving a question of privilege, the following resolution:

Whereas the continued enjoyment of full representation in this House by any State which has, for reasons other than participation in rebellion or other crime, denied to any of the male inhabitants thereof being 21 years of age and citizens of the United States the right to vote for Representatives in Congress, Presidential electors, and other specified officers is in direct violation of the fourteenth amendment to the Constitution of the United States, which declares that in such case "the basis of representation therein shall be reduced in the proportion which such male citizens bear to the whole number of male citizens 21 years of age in such State," and is an invasion of the rights and dignity of this House and of its Members and an infringement upon the rights and privileges in this House of other States and their Representatives: and

Whereas since the last apportionment the States of Mississippi, South Carolina, and Louisiana have, by changes in the constitutions and statutes of said States, and for reasons other than participation in rebellion or other crime, denied the right of suffrage to male inhabitants 21 years of age, citizens of the United States, and such denial in each of said States extends to more than one-half of those who, prior thereto, were entitled to vote, as appears from the following statistics, published in the Congressional Directories of the Fifty-second and Fifty-sixth Congresses, viz:

In the seven districts of Mississippi the total vote cast for all Congressional candidates in 1890 was 62,652; in 1898, 27,045. In the seven districts of South Carolina the total vote in 1890 was 73,522, and 28,831 in 1898. In the six districts of Louisiana 74,542 in 1890, and 33,161 in 1898.

One Member of the present House, representing ten counties in Mississippi, with a population in 1890 of 184,297, received only 2,068 votes. One Member of the present House, representing six counties in South Carolina, with a population in 1890 of 158,851, received only 1,765 votes, and one Member representing thirteen counties in Louisiana, with a population of 208,802, received only 2,494 votes; and

Whereas it is a matter of common rumor that other States have, for reasons other than those specified in the Constitution of the United States, denied to some of their male inhabitants 21 years old and citizens of the United States the right to vote for Members of Congress and Presidential electors,

<sup>&</sup>lt;sup>1</sup> 131 Stat. L., pp. 733, 734.

<sup>&</sup>lt;sup>2</sup> Second session Fifty-sixth Congress, Journal, pp. 80, 81; Record, pp. 520–522.

as well as executive and judicial officers of said States and members of the legislature thereof, and no reduction has been made in the representation of any State in this House because of such denial; and

Whereas the President of the United States has, by message, recommended "that the Congress, at its present session, apportion the representation among the several States as provided by the Constitution:" Therefore,

Resolved, Section 1. That the Committee on Census shall be, and is, authorized and directed, either by full committee or such subcommittee or subcommittees as may be appointed by the chairman thereof, to inquire, examine, and report in what States the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislatures thereof is denied to any of the male inhabitants of such States 21 years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, and the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in each such State.

Mr. James D. Richardson, of Tennessee, made the point of order that the resolution was not privileged.

After debate the Speaker<sup>1</sup> held as follows:

The matter seems to the Chair clearly settled by Article XIV, section 2, of the Constitution.

The Clerk having read the section referred to, the Speaker continued:

This is a most important section, and gravely touches the very vitals of the Republic as such, and makes mandatory upon Congress certain things that shall be done by Congress if certain conditions exist. This resolution alleges that certain things exist, expressly provided for by the section just read by the Clerk. The resolution and the preamble must be considered together. What is the object of the resolution providing for the investigation to be made by the Committee on the Census? It is to ascertain the truth of these facts and lay them before Congress so that proper action may be taken by this body.

The resolution is—

"That the Committee on Census shall be, and is, authorized and directed, either by full committee or such subcommittee or subcommittees as may be appointed by the chairman thereof, to inquire, examine, and report in what States the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislatures thereof is denied to any of the male inhabitants of such States 21 years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, and the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in each such State."

Can any wiser course be suggested for carrying out the clear mandates of the Constitution than by the provision of this preamble and the resolution? The grave charges are made, and the resolution to carry out the proper investigation and treatment is before us. The whole matter, waiving all discussion of the rules of this House, comes under the higher rule than our rule, the constitutional rule which is here absolutely mandatory, and the Chair is unable to see why we should wander even among the precedents, which the Chair has looked over to some extent and which are all one way, when we have the plain language of the Constitution before us. The resolution is evidently carefully drawn in pursuance of the language of the Constitution. The Chair only hopes that he will never have occasion to settle a more difficult question than this, which seems to him so simple. The Chair therefore overrules the point of order.

**306.** A bill relating to the taking of the census was held to be privileged because of the Constitutional requirement.—On January 16. 1900,<sup>2</sup> Mr. Albert J. Hopkins, of Illinois, from the Select Committee on the Twelfth Census, reported as privileged the bill (S. 2179) "relating to the Twelfth and subsequent

<sup>&</sup>lt;sup>1</sup>David B. Henderson, of Iowa, Speaker.

<sup>&</sup>lt;sup>2</sup> First session Fifty-sixth Congress, Record, p. 884; Journal, p. 166.

censuses, and giving to the Director thereof additional power and authority in certain cases, and for other purposes."

Mr. Charles A. Russell, of Connecticut, made the point of order that the report was not privileged.

After debate the Speaker 1 held-

The question arises by the gentleman from Illinois [Mr. Hopkins], chairman of the Special Committee on the Twelfth Census, bringing in his report.

Were this an original question that had not been passed upon, the Chair might rule differently than he feels constrained to rule at this time.

The Constitution of the United States makes it mandatory upon Congress to take a census of the people every ten years. It also requires the Congress to make an apportionment of the Members of Congress for each State. The Constitution also authorizes the Congress to adopt rules for its procedure.

If this were an original question, the Chair would be inclined to hold that if the House adopts rules of procedure and leaves out any committee from the list of committees whose reports are privileged that that committee would be remitted to those rules of procedure adopted by the House for its guidance. But the Chair finds that a question which the Chair thinks is identical in every particular was ruled upon in the Fifty-first Congress. I quote:

"A bill making an apportionment of Representatives presents a privileged question. On December 16, 1890, Mr. Mark H. Dunnell, of Minnesota, as a privileged question, moved that the House proceed to the consideration of the bill of the House (H. R. 8500) making an apportionment of Representatives in Congress among the several States under the Eleventh Census. The bill having been read at length, Mr. James H. Blount, of Georgia, made the point of order that under the rule the Committee on the Eleventh Census was not included among those having the right to report at any time such business as would properly come before said committee, and that, therefore, the consideration of the bill at this time was not a privileged question."

The House will see that it could not be more fairly and squarely stated than Mr. Blount stated it:

"The Speaker, Mr. Reed, being in the Chair, overruled the point of order, on the ground that a bill making an apportionment is a, privileged question, and it being a constitutional duty imposed on Congress, the consideration of the bill was clearly a privileged question."

At that time the Fifty-first Congress had its Committee on Rules, and probably there never was one more active than the Committee on Rules of that Congress. It was equipped with all the rules of procedure, and yet the Committee on the Eleventh Census was not clothed with the power to report at any time. Now, the Chair is unable to see any distinction in principle between an apportionment bill and a bill for taking the Twelfth Census. The Chair has examined this bill. It is amendatory of the act which we passed in the last Congress for taking the Twelfth Census. It is supplemental to that act. It contains simply provisions for taking the Twelfth Census, all in the same line, and all required by the Constitution.

If the decision made in regard to the consideration of the apportionment bill was sound law, it seems to the Chair clear that it ought to be a sound ruling that this is privileged. The Chair thinks gentlemen of the House will all agree that when decisions are made it is well, unless they are clearly in abuse of the rules of the House, that these precedents should be followed. It is a guide to all Members and will aid them in their work.

Now, when the bill for the Twelfth Census was first brought up the gentleman in charge of the bill, the same gentleman as now presents this, offered it as a privileged report. The Speaker did not rule upon it. The gentleman from Texas [Mr. Bailey] reserved all rights against the bill, saying that he was not clear that it was a privileged bill at all, and with that reservation the bill was considered as introduced in the House, to be printed for the information of the House, and the chairman of the committee, the gentleman from Illinois, gave notice that he would call it up the following Monday.

That being suspension day, it was passed under suspension of the rules, and the suggested questions of the week before, or some days before, were not passed on. But the Chair is clearly of the

<sup>&</sup>lt;sup>1</sup>David B. Henderson, of Iowa, Speaker.

opinion that the decision made in the Fifty-first Congress is sufficient warrant for holding this to be a privileged question.

Mr. Joseph W. Bailey, of Texas, appealed from this decision of the Chair, and during the debate the Speaker said:

The Chair desires to say \* \* \* that the point made is clearly well made; but there is not an element in this bill but that might have properly been in the original bill. What the judgment of the House may be as to the elements of this bill is another question, but it is all germane and pertinent to the enumeration of the Twelfth Census. The Members of the House may differ as to the propriety of some of these provisions, but whether they do or not, they are all in line with the demands of the Constitution which require this body to take the census every ten years and to provide the manner for doing the same. \* \* \*

The language of the Constitution is this:

"The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."

Now, taking the census is the basis of apportionment, and the apportionment follows. Both are absolutely and explicitly commanded by the Constitution. If the decision about the apportionment was a correct decision, there can be no escape from the Chair's holding that the provision of law for taking the census is also within the constitutional provision.

On the succeeding day, January 17, the decision of the Chair was sustained, the appeal being laid on the table by a vote of yeas 165, nays 138.

**307.** A bill making an apportionment of Representatives presents a question of constitutional privilege.—On December 16, 1890,<sup>1</sup> Mr. Mark H. Dunnell, of Minnesota, as a privileged question, moved that the House proceed to the consideration of the bill of the House (H. R. 12500) making an apportionment of Representatives in Congress among the several States under the Eleventh Census.

The bill having been read at length, Mr. James H. Blount, of Georgia, made the point of order that under the rules the Committee on the Eleventh Census was not included among those having the right to report at any time on such business as would properly come before said committee, and that therefore the consideration of the bill at this time was not a privileged question.

The Speaker<sup>2</sup> overruled the point of order on the ground that a bill making an apportionment is a privileged question, and it being a constitutional duty imposed upon Congress, the consideration of the bill was clearly a privileged question.

**308.** On February 7, 1882,<sup>3</sup> Mr. Cyrus D. Prescott, of New York, as a privileged question, moved that the House proceed to the consideration of the bill (H. R. 3550) making an apportionment of Representatives in Congress among the several States under the Tenth Census.

Mr. John A. Anderson, of Kansas, made the point of order that the motion was not one of privilege.

After debate the Speaker 4 said:

The Chair will state briefly that it is of opinion that the rules of the House are always subject to any constitutional provision that may be found. It may be true that under the rules, strictly speaking,

<sup>&</sup>lt;sup>1</sup> Second session Fifty-first Congress, Journal, p. 59; Record, p. 530.

<sup>&</sup>lt;sup>2</sup>Thomas B. Reed, of Maine, Speaker.

<sup>&</sup>lt;sup>3</sup> First session Forty-seventh Congress, Journal, p. 519; Record, pp. 960–963.

<sup>&</sup>lt;sup>4</sup> J. Warren Keifer, of Ohio, Speaker.

this bill may not be in order. The Chair is, however, of opinion that the consideration of an apportionment bill by this Congress, fixing the representation in the next Congress under the last census, is one of high constitutional privilege. The duty of Congress to make an apportionment after each census is made imperative by the first clause of the second section of the fourteenth article of the amendments to the Constitution of the United States, which reads as follows:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

It is a fact of which we must take notice, that this Congress must pass an apportionment bill, fixing the number of Representatives in the next Congress, or serious consequences must follow. The consideration of this question is analogous, perhaps, to no other question that is made imperative by the Constitution upon Congress. The state of the census; the fact that this Congress alone must act, and that apportionment under the last census can not go over to the next Congress; the necessary legislation that must take place in the different States at an early time, must all be taken into account.

In view, therefore, of the character and scope of this measure, and its constitutional character, the Chair feels bound to hold that it is a question of high constitutional privilege. The Chair desires also to state in this connection that it is informed that this has been treated as a question of privilege at various times in the past history of Congressional legislation.

309. The election cases of the New Hampshire, Georgia, Mississippi, and Missouri Members in the Twenty-eighth Congress.

The House gave prima facie effect to the credentials of certain Members, although the legality of the manner of their elections was questioned.

On December 4, 1843, at the time of the organization of the House, Mr. D. D. Barnard, of New York, objected that the gentlemen presenting themselves with credentials from the States of New Hampshire, Georgia, Mississippi, and Missouri had been elected on general tickets and not by districts, as prescribed by the law of Congress. The Clerk, having declined to entertain a motion, the gentlemen in question were sworn in and participated in the election of Speaker.

On December 13<sup>2</sup> Mr. Garrett Davis, of Kentucky, brought the subject to the attention of the House, and on December 20,<sup>3</sup> by a vote of yeas 148, nays 32, it was—

Resolved, That the Committee of Elections be directed to examine and report upon the certificates of election, or the credentials of the Members returned to serve in this House; and that they inquire and report whether the several Members of this House have been elected in conformity with the Constitution and law.

310. The election cases of the New Hampshire, Georgia, Mississippi, and Missouri Members continued.

The House, in 1842, declared entitled to seats Members elected at large in several States, although the law of Congress required election by districts.

Discussion of the respective powers of Congress and the States in establishing Congressional districts.

Is the establishing of districts an exercise of the power of regulating the times, places, and manner of elections?

<sup>&</sup>lt;sup>1</sup>First session Twenty-eighth Congress, Globe, pp. 2, 10.

<sup>&</sup>lt;sup>2</sup> Journal, p. 50; Globe, p. 33.

<sup>&</sup>lt;sup>3</sup> Journal, p. 81; Globe, p. 54.

On March 15, 1844, Mr. Stephen A. Douglas, of Illinois, from the Committee of Elections, submitted the report, recommending the following resolutions:

*Resolved*, That the second section of "An act for the apportionment of Representatives among the several States, according to the Sixth Census," approved June 25, 1842, is not a law made in pursuance of the Constitution of the United States, and valid, operative, and binding upon the States.

Resolved, That all the Members of this House (excepting the two contested cases from Virginia, upon which no opinion is hereby expressed) have been elected in conformity with the Constitution and laws and are entitled to their seats in this House.

#### The second section of the apportionment act provided as follows:

That, in each case where a State is entitled to more than one Representative, the number to which each State shall be entitled, under this apportionment, shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which said State shall be entitled, no one district electing more than one Representative.<sup>2</sup>

The four States whose delegations were questioned had long had laws providing for election by general ticket, and had not changed them to conform to the law of Congress. Indeed, some of these States could not have done so without calling a special session of the legislature. There was therefore a conflict of law and sovereignty between those States and the United States, and it was important to know whether or not the law of the United States was in accordance with the provision of the Constitution—

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the place of choosing Senators.

#### The report, after examining the text and history of this clause, concludes—

that the convention which formed and the people who ratified that great charter of our liberties intended that the regulation of the times, places, and manner of holding the elections should be left exclusively to the legislatures of the several States, subject to the condition, only, that Congress might alter the State regulations, or make new ones, in the event that the States should refuse to act in the premises, or should legislate in such a manner as would subvert the rights of the people to a free and fair representation.

The report goes on to say that even if the power of Congress under the paragraph should be considered plenary and supreme as to prescription of time, place, and manner, yet the section of law in question did not constitute an exercise of the power in the manner prescribed by the Constitution. The law was inoperative and nugatory without State legislation. It merely presumed to dictate to the State legislatures how they should perform their duties under this clause of the Constitution. But there was no authority in the Constitution permitting Congress to compel State legislatures to change laws or make new ones. The laws of Congress might supersede or alter those of the States, but Congress might not direct the form of State legislation, or require enactments to be made in obedience to certain prescribed forms. The attempt to exercise such impracticable power was the evil of the old Confederation. Hence followed the conclusion that Congress should either designate the time, specify the places, and prescribe the manner by law, or leave it to the wisdom and discretion of the several State legislatures.

<sup>&</sup>lt;sup>1</sup>Bartlett, p. 47; House report No. 60.

<sup>&</sup>lt;sup>2</sup> For debates at the enactment of this law see second session Twenty-seventh Congress, Globe, pp. 445, 446, 463, 469, 496, 555, 561, 571, 576, 583, 588, 595, 601, 608.

In debating the question, on February 14,1 Mr. Douglas took the further position that Congress had no power to district the States, for that would be to prescribe the qualification of voters as to residence—a power expressly reserved to the States. The ward "manner" in the Constitution did not include so broad exercise of power.

The minority views, presented by Mr. Garrett Davis, of Kentucky, and concurred in by Messrs. Willoughby Newton, of Virginia, and Robert C. Schenck, of Ohio, contended that the Members whose seats were in question were not elected in pursuance of the Constitution and law, and that the seats should be declared vacant.

The minority quote that clause of the Constitution providing that "this Constitution and the laws of the United States which shall be made in pursuance thereof" shall be "the supreme law of the land," anything in the "laws of any State to the contrary," and declare that the elections in the four States must be void unless the law in question should be found unconstitutional or inoperative. The State legislatures, in providing the times, places, and manner of holding elections, acted as Federal agencies, and in testing the validity of their laws the Federal Constitution was the only guide. And the Constitution evidently, from its text and history, sanctioned the adoption of the district system by the States. The idea that the general ticket was the only constitutional method was newborn and fallacious. The States had been using the district system since the beginning of the Government.

If the clause relating to prescribing the times, places, and manner of elections did not give the power to Congress to determine whether Representatives should be chosen by general ticket in districts, then the State legislatures had not that power which they had been exercising so long. The States certainly had no implied power to conduct this or any other operation of the General Government. If the constitutional clause did not give, both to the legislatures and the Congress, the power to direct that Members of the House should be elected by districts or general ticket, then the regulation belonged to Congress exclusively as an implied power.

The minority proceeded to discuss the power of Congress to "alter" the regulations of States on this subject, holding that it gives to Congress plenary power to alter any regulations that the State may make on the subject.

Congress being able to exercise the undoubted power to provide for the whole manner of holding such elections, it could hardly be held that a partial exercise of that power was not constitutional. The objection, therefore, was not that Congress had exercised an unconstitutional power, but that it had defectively exercised a constitutional power. The question, therefore, was not whether the law was unconstitutional, but whether it could be considered a nullity. But because the regulation, standing alone, could not be executed did not prove it a nullity. The Constitution itself required legislation to make operative its provisions in respect to this subject. But the law of Congress made in pursuance of the Constitution was the supreme law of the land, and State legislatures were therefore bound to conform to it.

The minority views conclude with a paragraph deprecating an assault by the House of Representatives on a law of Congress.

<sup>&</sup>lt;sup>1</sup> Globe, p. 277.

From February 6 to February 14<sup>1</sup> the report was debated in the House. On February 13 in the House Mr. George C. Dromgoole, of Virginia, offered an amendment to the resolutions of the majority of the committee. This amendment, in the nature of a substitute, omitted all reference to the apportionment law, but declared all the Members of the House (except the two Virginia contested cases) from the unchallenged States elected and entitled to their seats. The amendment further declared the Members from New Hampshire, Georgia, Mississippi, and Missouri individually entitled to their seats, having been "duly elected."

On February 14 Mr. Dromgoole's amendment was agreed to—yeas 126, nays 57.

Then the question being on agreeing to the resolution as amended by the substitute, a division of the question was allowed, so that a separate vote was taken on each individual, and they were severally declared duly elected and entitled to their seats by votes not varying greatly from that by which the substitute was agreed to.

311. The New Hampshire election case of Perkins v. Morrison in the Thirty-first Congress.

The New Hampshire districts being changed after Representatives to the Thirty-first Congress were elected, an election to fill a vacancy was called in the new district, and the election was sustained.

Discussion of the powers of Congress and the States as to fixing the times, places, and manner of elections.

On December 16, 1850,<sup>2</sup> the Committee on Elections reported on the contested election of Perkins v. Morrison, from New Hampshire. The whole case turned on the apportionment act of the State legislature of July 11, 1850. This act, in establishing the Third district, included in it four towns which were in the Second district under the former apportionment, enacted by the law of July 2, 1846. The act of July 11, 1850, repealed all acts inconsistent with it and contained a provision that it should go into effect from its passage.

On September 9, 1850, Mr. James Wilson, who had been elected for the old Third district, resigned, and by precept of the governor a special election was held in the new Third district on October 8, 1850. At this election George W. Morrison received a majority of 63 votes over Jared Perkins. But Mr. Perkins showed that if the election had been held within the limits of the old district only he would have been elected, since Mr. Morrison's majority came entirely from the four towns included by the law of July 11, 1850.

The majority of the committee found:

By the Constitution of the United States, the right to prescribe the times, places, and manner of holding elections for Representatives in each State is declared to be in the legislature thereof, subject to the superior power of Congress to make or alter such regulations by law. That, power, however, Congress has never exercised, unless it was partially exerted by the second section of the act of June 25, 1842, to which reference has already been made. Limited only, therefore, by the provisions of that section, the legislature of New Hampshire had plenary power to prescribe by what districts the elections should be made, and to change the boundaries of those districts at its pleasure and at any time. No constitutional provision, no law of Congress, restrains this right originally to form, or subsequently to alter, the limits of

<sup>&</sup>lt;sup>1</sup> Journal, pp. 353, 356, 359, 362, 365, 367, 379; Globe, pp. 236, 241, 248, 252, 255, 264, 276.

 $<sup>^2</sup>$  Second session Thirty-first Congress, 1 Bartlett, p. 142; Rowell's Digest, p. 135; House Report No. 3.

Congressional districts, at the discretion of the State legislature. It is conceded that Congress could by law have exclusively determined the extent of each district, and enacted that it should remain unchanged under the apportionment during the entire period of ten years. But this has not been done. The act of June 25, 1842, only enacted that the elections (alike general and special) should be by districts of contiguous territory; and, under the law, the limits of each district must be as they were before its passage—such as the legislature of the State may from time to time prescribe. The act of Congress is merely commendatory. It was not possible to delegate to the State legislature the legislative power vested by the Constitution in Congress. It follows, of course, that the districting acts are the untrammeled action of the legislative assembly of New Hampshire, and consequently that the power to change the boundaries of a district remains unlimited in the same legislature. Your committee are not informed that this position has hitherto ever been seriously controverted. Such appears to have been the common understanding. The legislatures of several of the States, after having formed Congressional districts in conformity with the recommendation of the act of Congress of June 25, 1842, have subsequently redistricted the States, or made changes in the boundaries of the districts previously formed. North Carolina, Georgia, Ohio, and Pennsylvania are among the number. Representatives elected from the districts thus reorganized have been admitted to seats in the House without objection. More than twenty Representatives elected by these remodeled districts sit unchallenged in the present

But it is urged, on behalf of the contestant, that if the power be conceded to the legislature of New Hampshire to redistrict the State, the distracting act of July 11, 1850, does not extend to an election to fill vacancies in the Thirty-first Congress. In terms, however, it unquestionably does. It took effect from its passage. It repealed so much of the former act as was inconsistent with its provisions. Immediately on its passage, therefore, there were no Congressional districts in New Hampshire other than those limited by this later act. An election to fill the vacancy occasioned by the resignation of Mr. Wilson could therefore have been held in no other manner than that in which the sitting Member was elected. The Third district, by which Mr. Wilson was elected, was a creature of the act of July 2, 1846; it was sustained by it and ceased with it. When, therefore, an election was ordered to be held on the 8th of October, 1850, no political division, no Congressional district, embracing exclusively the counties of Hillsborough and Cheshire, had any legal existence. It had given place to the Third district, as limited by the Second districting act. The governor of the State could issue his precept to none other than an existing district.

The committee also found no difficulty in the fact that the legislature had extended the provisions of the act to vacancies occurring in the Thirty-first Congress. While it might be bad policy to change districts once made, yet the legislature undoubtedly had that power. Nor were the committee impressed with the argument that the voters of the four towns, having voted both in the Second and Third districts, enjoyed double representation. This they conceived to be founded on an erroneous view of the theory of constitutional representation. The division of a State into districts was a regulation of the manner of elections, not of the extent of representation. The argument that a legislature might so change districts that the governor could not tell in which to call an election in case of vacancy did not weigh with the committee, since it did not seem reasonable to argue that a power did not exist simply because it might be abused.

Therefore the majority of the committee reported a resolution declaring Mr. Morrison entitled to the seat.

The minority took the ground that the act of 1850 was not intended to apply to elections to this Congress, and that if it were so intended it was a law that the legislature had no authority to make. Therefore the minority reported a resolution declaring Mr. Perkins entitled to the seat.

The case was debated fully in the House on January 7, 8, 9, and 10, 1851.1

<sup>&</sup>lt;sup>1</sup> Journal, pp. 119, 124, 126–130; Globe, pp. 183, 193, 204.

On a motion to substitute the minority for the majority proposition, the yeas were 84, navs 103.

On agreeing to the resolution of the committee that Mr. Morrison was entitled to the seat, there were 98 yeas and 90 nays. So the sitting Member was confirmed in his seat, Mr. Morrison having taken his seat on his credentials at the beginning of the session.

## 312. The North Carolina election case of Pool v. Skinner in the Fortyeighth Congress.

The North Carolina districts being changed after Representatives to the Fortyeighth Congress were elected, the House did not disturb the Member chosen in a new district to fill a vacancy in an old district.

Discussion as to the functions of a governor in calling an election to fill a vacancy in the Congressional representation.

On March 8, 1884, Mr. Henry G. Turner, of Georgia, from the Committee on Elections, submitted the report of the majority of the committee in the North Carolina case of Charles C. Pool v. Thomas G. Skinner.

On November 7, 1882, at the regular election for Members of the Forty-eighth Congress, Walter F. Pool was chosen a Representative from the First district of the State.

On March 6, 1883, the State was redistricted by the legislature, and the First Congressional district was changed by taking away from it Bertie County and adding Carteret County. This act, by its terms, was in force "from and after its ratification."

On August 23, 1883, Mr. Walter F. Pool died.

The majority thus treats the question arising:

Subsequently the executive authority of the State issued a writ of election directing an election to be held on the 20th day of November, 1883, in the counties of the First district, as defined by the act of March, 1883, to fill the vacancy caused by the death of Mr. Pool. At this latter election Thomas G. Skinner and Charles C. Pool were opposing candidates, and Mr. Skinner was, by the proper authority, declared to have been elected.

It is proper here to add that Mr. Charles C. Pool has served upon Mr. Skinner notice of contest, to which Mr. Skinner has filed his answer, and from the attorneys for the parties we have obtained the facts on which the foregoing statement is founded:

The Constitution, article 1, section 4, clause 1, provides that—

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."

Section 2, clause 4, of the same article of the Constitution provides that—

"When vacancies occur in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies."

The question is whether, after a Representative is elected by the people of a district before a change of its boundaries, a vacancy caused by his death can be filled by the people of the district after its boundaries are changed.

The Constitution seems to treat Members of the House as Representatives of the States, and not of districts merely; and the States have the right to determine what portion of their people shall choose these Representatives, subject only to the last apportionment act Of Congress. The State of North

<sup>&</sup>lt;sup>1</sup> First session Forty-eighth Congress, House Report No. 727; Mobley, p. 66.

Carolina, by the act ratified on the 6th of last March, has provided "that for the purpose of selecting Representatives to the Congress of the United States, the State shall be divided into nine districts." This language might well be said to cover and include all elections, general as well as special; nor does it exclude any Congress. But this view is greatly reenforced by the second section of the act, which provides that it "shall take effect from and after its ratification." The old arrangement of the counties into eight districts was therefore abolished. The governor disregarded the old law, which had been superseded without any reservation, and followed as well as he could the law which was of force at the time of Mr. Walter F. Pool's death, and at the date of the writ of election.

There is no provision in the statutes of North Carolina which prescribes the place of the election made necessary under the special circumstances of this case, and the effort seems to have been made to approximate in the location of the election, as nearly as possible under the existing distribution of the counties into districts, to the territory the people of which chose Mr. Pool as their Representative.

The practice in the States in cases similar has been variant, the election in some cases having been ordered in the new district, in others in the old district. The practice in the House has been uniformly to acquiesce in the action of the State authority; and, following this line of consistency, if the governor of North Carolina had ordered the election to fill this vacancy in the old district, we would not have felt it our duty to recommend that the election should be vacated. By the Constitution of the United States, before cited, the governor is constituted the tribunal to determine when and where to order an election to fill a vacancy, and where the laws by which he is to be guided are doubtful his decision ought to be followed by Congress. This course is founded upon precedent, upon the respect due to State authority, and upon that public policy which requires full representation of the States.

It has been contended that the code of North Carolina (section 2722) in reference to vacancies furnishes the rule for a case like this, but, in our opinion, that section only requires that the governor shall issue his writ of election, and by proclamation require the voters in the different townships in their respective counties, at such time as he may appoint, and at the places established by law, then and there to vote for a Representative in Congress to fill the vacancy. Such is the language of the section, and it does not militate against the course which the governor pursued in this case.

Some stress has been laid upon section 3868 of the code of North Carolina, which is as follows: "The repeal of the statutes mentioned in the preceding section shall not affect any act done, or right accruing or accrued, or established, or any suit or proceeding had or commenced in any case before the time when such appeal shall take effect; but the proceedings in every such case shall be conformed when necessary to the provisions of this code."

The previous section repeals all public and general statutes of the State with the exceptions and limitations just enumerated. But it must be borne in mind that this code containing this provision did not take effect until the 1st day of November, 1883, while the new districting act, which was also included in this code, took effect from and after March 6, 1883, and contained no such provision. Besides, we think that this section of the North Carolina code relates only to private vested rights, such as could be asserted in the courts.

Much has been said about absurd consequences which may follow under the view taken in this report; but we think that such an argument would be more fitly addressed to the legislatures of the States. And we do not hesitate to say that we would be glad to see such a regulation provided by the States as would obviate these absurd consequences. Perhaps Congress might effectuate this end in the apportionment act made necessary after every census.

As the result of this report, we submit the following resolution, and recommend its adoption:

Resolved, That Thomas G. Skinner retain his seat without prejudice to the ultimate right to the seat involved in the contested-election case of Charles C. Pool v. Thomas G. Skinner.

## Mr. J. C. Cook, of Iowa, while concurring in the conclusions of the majority, dissented from the doctrine therein set forth:

Representation of the States in Congress by districts has so long been the universal rule that any doubt of the power of Congress to require the subdividing of States must be regarded as set aside. When a State has been divided and Representatives elected for a certain Congress, each district must be regarded as an existing fact for and through that entire Congress, and as the person elected from a particular district has the right to hold the office during the legal term of that Congress, so his office must

be held to exist in law and in fact for the entire term of the Congress of which he is a Member. As the State legislature can not legislate him out of office, so it can not destroy the office which he fills; no more can it destroy the district upon which the office rests.

I am clearly of the opinion that the only people who had a right to participate in the election to fill the vacancy were those of the old district, and that all votes cast outside of this district were void. The governor's duty was ministerial. He could do no more than fix the day for the election. The fact that he invited the people of Carteret County to participate in the election did not authorize them to vote, neither do I think that his failure to invite the people of Bertie deprived them of their fixed right to vote. The only material thing he was authorized to do was to fix the time for the election. Suppose he simply called the election with sufficient definiteness to indicate the officer to be voted for or the vacancy to be filled and set the time, but had not mentioned the counties in which the election should be held, would there be any question as to the validity of an election held in the old district? As he had no power to determine or change the district, what he attempted in that direction was mere surplusage in his proclamation. From this it seems to me the people of Bertie County had a right to participate in the election; certainly if they had, their votes would here be counted.

It is universally held when notice of an election is required by law and is not given that this is not fatal. This being a special election can not change the rule. The only difference is that in the one the time is fixed by law, while in the other this is fixed by the proclamation of the governor. Mr. Skinner received a majority of the votes cast in the old district. The fact that the people of Bertie County did not vote can not invalidate the act of those who did vote. It will not do to say no opportunity was given them. They could have asserted their rights given them by law. If no officers appeared to open the polls they could organize and hold the election at the places fixed by law. When we concede, as we must, that had they done this their votes would be made effective here at least, it must follow that having failed to do so they can not complain.

But if there is doubt on the foregoing proposition, there can be none on the following:

Mr. Skinner is here duly returned as a Representative from his State. No fraud is charged in his election, no misconduct on the part of any one; nothing more than a mistake on the part of the governor in calling the election. Neither the people of Bertie County nor any one of them complains. The State acquiesces, the district is satisfied, and no complaint is made by any one in Bertie County.

In view of all this, bearing in mind the fact that there was no intentional wrong, no fraud upon the ballot, or affirmative interference with the right of the citizens, considerations of "respect due to State authority, and that public policy which requires full representation of the States" would dictate that the House should not, of its own motion, declare a vacancy and require another election.

#### The minority views, filed by Mr. A. A. Ranney, of Massachusetts, hold—

that the right of representation for the full term of the Forty-eighth Congress inhered in the people of the old district as an accrued or an established right, and that they alone had the right to fill the existing vacancy.

#### The minority continue:

This right was secured to them on a fundamental principle of our representative Government and by positive law, both Federal and State. We hold these principles and these propositions to be radical and fundamental in our Government: (1) No portion of the people or territory of a State can be rightfully deprived of a representation in Congress; (2) no portion of the people or territory are rightfully entitled to a double district representation in Congress.

If the present election is sustained, both of these propositions are violated. The people and territory of Bertie County, with a population of 16,392 and 2,588 voters, are deprived entirely of all district representation in the Forty-eighth Congress, and Carteret County, with a population of 9,756 and 1,600 voters, is allowed a double representation.

It also appears that by means of calling and holding the election in the new district instead of the old the political complexion of the representation has been reversed. Bertie County casts a Republican majority of about 800, Carteret County a Democratic majority of about 400, and contestee was returned as elected by a majority of about 700.

The election was called by the lieutenant-governor in the absence of the chief executive. The essential facts are not in dispute.

A construction of the law which works such an infraction of important political rights and results in a wrong so palpable and gross will not be readily accepted as designed by the enactors thereof. We believe the true rule to be as enunciated by Judge McCrary (sec. 179), "That a district once created, and having elected a Representative in Congress, should be allowed to continue intact for the purpose of filling any vacancy which may occur until the end of the Congress in which it is represented." It will be seen, we think, that the existing legislation not only admits of the application of this rule in this case but allows of no other reasonable construction.

Having, examined the question of fact as to what the laws of Congress and the State actually provided, and having become satisfied that the state of the law was such as to require the election to have been held in the old district, the minority continue:

The majority report cites that clause of the Constitution which reads as follows (Art. I, sec. 4, clause 1):

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."

But we can not see how this gives any support to the action of the executive.

The governor had no right, and was not empowered by law, to determine in what district the election should be held to fill a vacancy. The power is given to the legislature of the State to prescribe the time, place, and manner of holding elections, with a power reserved to Congress to alter the regulations made or to make them itself. It does not rest with the governor to do it. The general assembly has made regulations in North Carolina, giving the governor power to fix the time for holding special elections, and making his duty to issue a writ of election, and by proclamation to require the voters of the townships in the counties composing a district to fill a vacancy in case it occurs. In general elections the time is fixed by statute (Code, sec. 2721). Except as to the time everything is fixed and regulated by legislative action, and when the governor has fixed the time and issued the writ, the election is to be held in every respect as established by law (sec. 2722 of Code). An attempt seems to be made in the majority report to prove that the governor has legislative power, so he may determine what district the election shall be held in. If this were so he might have ordered an election at large, or in anyone of the old eight, or either of the nine new, districts, which would be absurd. Districts are established by law, and that law binds the governor as much as any other citizen. The governor has no authority beyond what is conferred upon him by law, and when he assumes any other he usurps it.

If it is meant to be claimed that the governor's interpretation of the law is binding, we have only to call the attention of the House to the well-recognized law that the governor is not a judicial officer, but his functions are purely executive in their character. Decisions of State courts in interpreting local statutes are heeded in the Federal courts. It is not so with the interpretations put upon the law by an executive officer.

The minority then cite the Tennessee cases of 1871, and the Iowa case in the Forty-sixth Congress, and after commenting thereon, says:

It is vain and a mistake to treat a Congressional district as a corporation, with officers and election machinery, for as such it has none. They exist in the townships and the counties exclusively. No powers were needed, therefore, to be reserved to the districts in analogy to dissolved corporations. A Congressional district has no corporate existence whatever. Defining its boundaries is only naming the counties, the voters in which are to vote for a Representative to Congress. Numbering them is purely arbitrary, and correspondence in numbers does not determine the identity of the district as to counties composing the same. In the new nine, number one may not have contained a single foot of territory which was embraced in the old number one.

We have treated the case thus far under the particular legislation of North Carolina. The distinguishing elements existing take this case out of the operation of the rule and doctrine followed in

Perkins v. Morrison (1 Bart., 142), and which gave rise to the conflict of precedents in this House, considered by McCrary in his work (secs. 179, 180). The doctrine of that case was reversed by case of Hunt v. Menard (2 Bart., 477), although the latter was complicated somewhat by another question of fraud. In both of those cases, and in the case of Mr. Taylor, of Ohio, in the Forty-sixth Congress, and of Doctor McLean, in the Forty-seventh Congress, the original election was not held under an act of Congress. The old districting acts had been absolutely repealed, and there was no State law providing for filling vacancies. Hence all the trouble in those cases. No such state of law exists in the present case.

The importance of these distinctions in two respects will be appreciated and shown by referring to the report of the committee in Hunt v. Menard, section 180 of the work of Judge McCrary. We quote a portion of the same:

"The act of the legislature of Louisiana of August 22, 1868, making a new division of the State into its five Congressional districts, by its terms purports to repeal all laws and parts of laws in conflict with said act, but is silent on the subject of vacancies that might occur in the districts as then existing.

"The language of the minority report in the case of Perkins, on the New Hampshire statute, is appropriate on this point as well as on this case generally, and we quote from it as follows:

"It does not purport to provide for any method of filling vacancies that might occur in the future, and beyond all question it was understood as providing only for the election of Members to future Congresses. Such are the terms of the act, and such must also be its spirit. A vacancy in the House of Representatives is the occurrence of an event by which a portion of the people are left unrepresented and the filling of that vacancy is directed by the Constitution in such explicit language as requires no aid from State enactments to perfect the right.'

"The second section of the first article of the Constitution reads: When vacancies occur in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.' This is the only provision of law on the subject of vacancies, and it is ample and sufficient."

#### Concluding, the minority say:

We are of opinion that the election should be declared invalid. It is not a case of mere irregularity in nonessential particulars or one where no substantial injury has been done. The whole foundation of the election is illegal and the infirmity is deep and fatal. Over 16,000 people have been deprived of all district representation and some 10,000 have got a double representation, and the political complexion of the representation has been reversed. That end may have been the guiding consideration which led to the action of the executive. If not so in this case, such may be the case hereafter under like circumstances, and the other party suffer at that time. Other cases are likely to arise this term of Congress. One has already arisen, and the vacancy has been filled in the old district, and the question may come up again soon.

Assuming that the executive could have called the election either in the old or the new district, and had it legal, as found by the majority report, the conduct of the lieutenaut-governor, acting as chief in the temporary absence of the governor, in disregarding the three last precedents of this House and the doctrine approved in the standard authority in Congress, cannot easily be reconciled with the assumption of good faith.

The contention that there has been something done by which the rights of the aggrieved parties have been lost does not seem to us to be entitled to much consideration. They are before the House by the contestant, who is authorized by an act of Congress to represent them in conducting the contest. No memorial was necessary. There has been no such thing as what is called in law acquiescence. Enforced submission to executive authority is not acquiescence as known to the law. No appeal to the courts would have been of any avail, as they had no jurisdiction. An appeal here was the only means of redress allowed by law. This is a public inquiry, and not altogether personal, and the House has a duty to perform under the Constitution, which requires it to determine the validity of the election, and does not allow it to elect Representatives nor to admit to seats persons not duly elected.

The people of Bertie County had no official notice of the election, and if they had heard of it otherwise any effort to vote would have been in vain, as, presumably, no polls were opened and no

election machinery set in motion in that county. It was a special election, and the law did not fix the

Besides this, the question of acquiescence is a question of fact, and the committee had no authority to hear or take evidence upon it, and have not done so. We do not know but that voters in Bertie County did try to vote. Acquiescence is not nonaction alone. There must be failure to act where action would have availed.

We recommend the passage of the following resolutions:

Resolved, That the old First Congressional district of North Carolina, in which Walter F. Pool was chosen as Representative to the Forty-eighth Congress, was the only proper district in which to call and hold an election to fill the vacancy caused by his death.

*Resolved*, That Thomas G. Skinner is not entitled to retain longer his seat in this House as Representative from the First Congressional district of North Carolina to the Forty-eighth Congress.

This report was called up in the House both on June 12 and 27, 1884,<sup>1</sup> but on each occasion the House voted not to consider it. On July 5, 1884,<sup>2</sup> it was postponed to the second Monday of December.

Again on February 27, 1885,<sup>3</sup> it was again called up, but the House declined a third time to consider it. And Mr. Skinner retained the seat until the end of the Congress.

313. The Kentucky election case of Davidson v. Gilbert in the Fiftysixth Congress.

The House declined to interfere with the act of a State in changing the boundaries of a Congressional district.

Discussion of the respective powers of Congress and the States in fixing the times, places, and manner of elections.

On March 1, 1901,<sup>4</sup> Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted a report in the case of Davidson v. Gilbert, from Kentucky. This contest arose chiefly from the fact that on March 11, 1898, an act was passed by the legislature changing the boundaries of the Eighth and Eleventh Congressional districts of Kentucky, whereby the county of Jackson was taken from the Eighth district and added to the Eleventh. Jackson County having a large Republican majority, the effect of its transfer to the Eleventh was to change the Eighth from a district which had immediately previously been Republican into a Democratic district.

The claims of the contestant that the act was contrary to the State constitution, and that it had never properly passed the legislature, are dismissed by the committee without discussion as having no foundation.

The third objection was that this act contravened an act of Congress, and this the committee considered at length in the light of Article I, section 4, of the Constitution—

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

<sup>&</sup>lt;sup>1</sup> Journal, pp. 1432, 1569.

<sup>&</sup>lt;sup>2</sup> Journal, p. 1701.

<sup>&</sup>lt;sup>3</sup> Second session Forty-eighth Congress, Journal, p. 709.

<sup>&</sup>lt;sup>4</sup> Second session Fifty-sixth Congress, House report No. 3000; Rowell's Digest, p. 603.

The report goes on to say that this is the first time that Congress has been asked to undo the work of a State which had divided itself into a proper number of Congressional districts. Reviewing the history of apportionments, the report says:

For nearly forty years the States proceeded to elect Representatives, some at large and some by districts. In 1840 the policy of electing by districts was generally approved and adopted, but several of the States continued to elect their Representatives by the vote of the entire State. The first legislation on the subject going beyond the mere apportionment of the States was enacted in 1842. In the apportionment act of that year an amendment was added in the House providing for the division of the several States into districts, composed of contiguous territory, equal in number to the number of Representatives to which the State was entitled, and each district to elect one Representative, and no more

The amendment provoked considerable discussion, but was finally adopted.

The apportionment act, based upon the census of 1850, made no provision for the division of States into districts, nor did the act of 1862. The act of February 2, 1872, provided that Representatives should be elected by districts composed of contiguous territory, and added the provision "containing, as nearly as practicable, an equal number of inhabitants." The same provision appears in the apportionment acts of 1882 and 1891.

So far as legislative declaration is concerned, it is apparent that Congress has expressed an opinion in favor of its power to require that the States shall be divided into districts composed of contiguous territory and of as nearly equal population as practicable. Whether it has the constitutional right to enact such legislation is a very serious question, and the uniform current of opinion is that if it has such power under the Constitution that power ought never to be exercised to the extent of declaring a right to divide the State into Congressional districts or to supervise or change any districting which the State may provide.

The best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts, but only that the constitutional provision was inserted for the purpose of giving Congress the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has failed or refused to make such provision itself.

In support of this view the report goes on to quote the views of Justice Story, Alexander Hamilton, James Madison, Chancellor Kent, Daniel Webster (as presented in a report made in the Twenty-second Congress), and Nathan Clifford (presented in a speech in the Twenty-seventh Congress), and concludes with this opinion:

Your committee are therefore of opinion that a proper construction of the Constitution does not warrant the conclusion that by that instrument Congress is clothed with power to determine the boundaries of Congressional districts or to revise the acts of a State legislature in fixing such boundaries and your committee is further of opinion that even if such power is to be implied from the language of the Constitution it would be in the last degree unwise and intolerable that it should exercise it. To do so, would be to put into the hands of Congress the ability to disfranchise, in effect, a large body of the electors. It would give Congress the power to apply to all the States, in favor of one party, a general system of gerrymandering. It is true that the same method is to a large degree resorted to by the several States, but the division of political power is so general and diverse that, notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results.

Therefore the committee reported a resolution confirming Mr. Gilbert's title to his seat.

The report was not acted on by the House, Mr. Gilbert of course retaining the seat.

314. The California election case of F. F. Lowe in the Thirty-seventh Congress.

A State having elected on a general ticket three Representatives when it was entitled to but two, the House denied a seat to the one receiving the fewest votes.

A State sending three Representatives when it was entitled to but two, the House gave prima facie effect to only two credentials.

Discussion of the census and apportionment law of 1850, which applied to succeeding censuses and apportionments.

California having in good faith elected one Member in excess of her apportionment, Congress by law provided for his admission.

On December 2, 1861, at the beginning of the second or regular long session of the Congress, two Members from California, Messrs. Aaron A. Sargent and T. G. Phelps, appeared, presented their credentials, and were sworn in without objection.

On the same day Mr. Phelps presented the credentials of Mr. F. F. Lowe as a third Member from California; but no motion or request was made that he be sworn in, and without debate his credentials were referred to the Committee on Elections.

On April 14, 1862,<sup>3</sup> the committee reported, setting forth the following state of facts:

By the apportionment under the Eighth Census [of 1860] California is entitled to three Representatives, and it is claimed by the memorialist that that apportionment applies to the present or Thirty-seventh Congress. By special provision of statute, enacted July 30, 1852, it was provided that California should have two Representatives till a new apportionment should take effect. But that State, believing that the apportionment based on the Eighth Census had already taken effect, did, at its general election held on the first Wednesday of September last, elect by general ticket three persons to represent her in the present Congress.

The Constitution provides that Representatives "shall be apportioned among the several States which shall be included within this Union according to their respective numbers;" and that "the actual enumeration shall be made within three years after the first meeting of Congress, and within every subsequent ten years in such manner as they shall by law direct." The census and apportionment thus connected together in the Constitution have been connected together in all subsequent legislation by Congress. It has been the course of legislation, up to the year 1850 and the taking of the Seventh Census, to provide for the taking of each census by special act, and, immediately upon its completion by a like special act to determine the number of Representatives, and apportion the same among the several States according to such census. But in providing for the taking of the Seventh Census in 1850 Congress undertook to establish a permanent system both for the taking of all future censuses and for all future apportionments. (Stat. L., vol. 9 p. 428.) That statute requires that the census shall be taken and returned to the Secretary of the Interior on or before the 1st day of November next ensuing the 23d day of May, 1850, the date of the act. The statute then provides, section 23, "If no other law shall be passed providing for the taking of the Eighth or any subsequent census of the United States on or before the 1st day of January of any year, when, by the Constitution of the United States, any future enumeration of the inhabitants thereof is required to be taken, such census shall in all things be taken and completed according to the provisions of this act." No other provision for the Eighth Census has been made.

<sup>&</sup>lt;sup>1</sup> Second session Thirty-seventh Congress, Journal, pp. 6, 7; Globe, pp. 2, 4.

<sup>&</sup>lt;sup>2</sup> The three were elected on a general ticket, and it appears that Mr. Lowe received the smallest vote of the three.

<sup>&</sup>lt;sup>3</sup> House report No. 79.

The statute then proceeds to provide, before the census is taken, for the then next apportionment to be based upon the census not yet taken, and for all further apportionments, as follows:

"Sec. 25. From and after the 3d day of March, 1853, the House of Representatives shall be composed of 233 Members, to be apportioned among the several States in the manner directed in the next section of this act.

"Sec. 26. So soon as the next and each subsequent enumeration of the inhabitants of the several States, directed by the Constitution of the United States to be taken, shall be completed and returned to the office of the Department of the Interior, it shall be the duty of the Secretary of the Interior to ascertain the aggregate representative population of the United States, by adding to the whole number of free persons in all the States, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons; which aggregate population he shall divide by the aggregate number 233, and the product of such division, rejecting any fraction of a unit, if any such happen to remain, shall be the ratio or rule of apportionment of Representatives among the several States under such enumeration; and the said Secretary of the Department of the Interior shall then proceed in the same manner to ascertain the representative population of each State, and to divide the whole number of the representative population of each State by the ratio already determined by him as above directed; and the product of this last division shall be the number of Representatives apportioned to such State under the then last enumeration."

The law further directed the Secretary of the Interior, "without delay" to make out and transmit to the executive of each State a certificate of the number of Representatives the State would be entitled to. And the Secretary of the Interior notified the governor of California that he had apportioned three Representatives to the State for the Thirty-eighth Congress. The State, however, concluded that they were entitled to them for the Thirty-seventh Congress under the law.

The majority of the committee held that the claim was based upon too strict and narrow a construction of the law of 1850. That law, as a whole, was intended to provide "that each subsequent census and apportionment should be made precisely as was provided in that statute for those then about to be made." And the law of 1850, therefore, should be held to mean that the time of future apportionments should correspond to that therein provided, the apportionment taking effect March 3, 1853. So the next apportionment should take effect March 3, 1863. The committee felt that every reasonable rule of construction suggested this conclusion. The committee say:

So far as the committee have been able to ascertain from the contemporaneous history, or the discussions in either House on its passage, or any subsequent criticism of it, till the present case has arisen, the idea never occurred to anyone that it provided, in this regard, one rule for the census of 1850 and consequent apportionment and a different one for any subsequent census and apportionment. On the other hand, there is much reason, if not constitutional obligation, that the rule should be the same for all, and that the last apportionment having been fixed to take effect "from and after the 3d day of March, 1853," the next should not take effect till ten years thereafter, or from and after the 3d day of March, 1863. The apportionment must follow and be based upon the census. The Constitution says Representatives shall be apportioned among the several States "according to their respective numbers;" and to ascertain these numbers the same section provides that "the actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct." The Constitution evidently contemplated a Census only once in ten years, and consequently a new apportionment based upon such census only once in ten years. The time when the First Census should be taken was not fixed, only it must be "within three years after the first meeting of the Congress of the United States." Now, Congress did provide for taking the First Census in 1790, the next in 1800, and in 1810, and in 1820, 1830, 1840, and 1850. So Congress has also provided by legislation, once in every ten years, that the apportionment, based upon

each one of these enumerations, respectively, shall take effect "from and after the 3d day of March, 1793," "from and after the 3d day of March, 1803," and from and after the same day in 1813, 1823, 1833, 1843, and 1853. In the absence of express enactment to the contrary, the committee can not doubt that it was likewise the intention of Congress, in providing for the Eighth Census, to provide that it shall be taken in 1860, and that the apportionment based upon it, like all that had preceded it, should take effect in the corresponding year, viz from and after the 3d of March, 1863. If it be held that apportionments of Representatives can not be made oftener than a Federal census is taken, and that the Constitution requires that that shall be taken only once in ten years, then it follows that the apportionment based upon the census of 1860 can not take effect till the 4th of March, 1863; else the period between the last two apportionments would be eight instead of ten years, while the period between all the rest would be ten years.

All construction of the constitutional obligation upon Congress to provide by law for the several "enumerations," and the apportionments based upon them, is uniform, and the course of legislation is without any conflict, all uniting in forcing upon the committee the construction they put upon this statute, that its intendment is that the apportionment based upon the census of 1860 shall take effect from and after the 3d of March, 1863.

The committee then discussed the inconveniences of any other construction were the same rule contended for by California applied to other States.

The committee say further:

But this Congress has, by positive enactment, declared when, in its opinion, the apportionment based upon the census of 1860 shall take effect, In an act passed only the last month, to modify that apportionment and give to several States therein named a greater number of Representatives than the apportionment under the statute of 1850 had given them, Congress has expressly enacted that the act shall take effect from and after the 3d day of March, 1863.

The minority of the committee, laying stress on the mandate that the Secretary of the Interior transmit "without delay" to the States certificates of the numbers of Representatives they were entitled to, and upon their inability to find any provision of the statute to prevent the apportionment taking effect immediately, contended that the apportionment applied to the Thirty-seventh Congress. Moreover, an act of July 30, 1852, provided that California should retain the number of Representatives provided by the act of admission to the Union "until a new apportionment." Congress also had apportioned a direct tax to California on the basis of the census of 1860. Could she, under the Constitution, be deprived of the Representatives allowed by that census?

Either California was entitled to three Representatives or none by virtue of the last election. All were elected on a general ticket, and the minority could not see how Messrs. Phelps or Sargent could retain their seats if Mr. Low be excluded. It was a well-settled rule of the House "that if any State return more Members than she is entitled [to], the election is void, and all must be excluded."

As to another argument of the majority, the minority urged that States, like individuals, could not be deprived of their legal rights because others failed to ask for theirs.

The report was debated on May 6,<sup>1</sup> and on the same day the question was taken on a substitute proposition declaring Mr. Low entitled to the seat. This was disagreed to—yeas 49, nays 69.

<sup>&</sup>lt;sup>1</sup> Globe, pp. 1967–1971.

Then the resolution of the committee declaring Mr. Low not entitled to the seat was agreed to without division.<sup>1</sup>

On June 2, 1862, an act of Congress <sup>2</sup> was approved, reciting the fact that California had population sufficient for three Representatives, that three had been duly elected, as appeared by the governor's certificate, and that direct taxes had been apportioned on a basis to justify three Representatives; and therefore increasing the representation of the State to three Members for the Thirty-seventh Congress.

On June 3, in accordance with this act, Mr. Low appeared and took the oath.<sup>3</sup>
315. The Tennessee election case of Thomas A. Hamilton in the Fortieth Congress.

The House did not give prima facie effect to credentials regular in form but borne by a person in addition to the number of Representatives allowed the State.

Instance wherein the House denied the privileges of the floor to a claimant for a seat.

On December 7, 1868 <sup>4</sup> Mr. Horace Maynard, of Tennessee, presented the credentials of Thomas A. Hamilton as a Member-elect from the State of Tennessee at large. It was explained that Tennessee thought herself entitled to this additional Representative because of the large number of colored people she had voluntarily admitted to citizenship. It was admitted that this Representative would be in addition to the number allowed Tennessee by the law of Congress.

No proposition was made to administer the oath to Mr. Hamilton, although his credentials were regular in form; and they were referred to the Committee of Elections without division.

Mr. Maynard moved, however, that he be allowed the privileges of the floor pending the decision of his claim. After debate as to the precedents, this motion was decided in the negative—ayes 45, noes 85.

316. The Tennessee election case of Thomas A. Hamilton, continued. The House denied the claim of a State to representation greater than the apportionment had given to her when the reasons for such claim applied to many other States.

Discussion of the constitutional questions relating to apportionment. Review of the acts of Congress giving increased representation in special cases.

On February 18, 1869,<sup>5</sup> Mr. Samuel Shellabarger, of Ohio, submitted the report of the committee, who were unanimously of the opinion that in the absence of an act of Congress increasing the representation of the State the claimant could not be admitted.

<sup>&</sup>lt;sup>1</sup> Journal, pp. 647, 648.

<sup>&</sup>lt;sup>2</sup> 12 Stat. L., p. 411.

<sup>&</sup>lt;sup>3</sup> Journal, p. 787; Globe, p. 2532.

<sup>&</sup>lt;sup>4</sup>Third session Fortieth Congress, Journal, pp. 8, 9; Globe, pp. 8, 9.

<sup>&</sup>lt;sup>5</sup> House Report No. 28; 2 Bartlett, p. 499; Rowell's Digest, p. 228; Globe, pp. 1329, 1330.

As to the advisability of passing an act the committee divided. The majority held that such a law should not be passed. They said:

Mr. Hamilton rests his claim to a seat, and his demand that a law shall be passed, upon substantially the following facts and considerations:

That in 1865 the people of Tennessee voluntarily emancipated their slaves, and thereby added twofifths of these, being by the census of 1860 110,287, to the representative population of that State and making the entire representative population of the State now 1,009,801, assuming that it is the same as shown by that census; that this entitles the State to 9 Representatives, retaining the same ratio of representation (127,000) as that upon which the apportionment was made in 1861.

It is urged that this being done when it was, and voluntarily by act of the people, and being accompanied by enfranchisement of the colored race, distinguishes the claim of Tennessee for the representation of her freed people from the States where the enfranchisement was subsequent and the result of Federal coercion. It is also claimed that the second article of the fourteenth amendment, making the rights of representation to be in proportion to the numbers of the voting races, sustains this claim. It is further urged that the refusal of it would dishearten the freedmen of Tennessee, who are alleged to regard the claimant as especially their representative, and would be disastrous to their interests as a race, now in especial need of the recognition and protection of their Government.

Upon substantially these considerations, as is alleged, the general assembly of Tennessee, on the 12th of March, 1868, adopted a joint resolution requiring the governor "to issue a writ of election, to the State at large, for the purpose of electing one additional Member to the Congress;" and the claimant presents the certificate of the governor showing that on the first Tuesday of November, 1868, the claimant was elected by the people of the State at large a Representative of the State of Tennessee in the Fortieth Congress.

After citing the clause of the Constitution relating to apportionment the report says:

What, then, is the legislation of the Constitution upon this subject, and what the rule by which it has bound the powers and discretions of this House and of the Congress? These are plain, unambiguous, and complete. Those requirements of this rule which are material to be here considered are—

First. That the apportionment must be made to each of the several States. The Congress, by other provisions of the Constitution, has the power to determine when a Territory or people are such in numbers or in organization or in attachment to the Government of the United States as to be fit or entitled to be admitted as one of "the several States included in the Union." But being so admitted and recognized by Congress as such State, the Congress has no discretion as to the apportionment to such State of representation, but must accord representation to each State so admitted and recognized by Congress.

Second. This apportionment must be based on the "numbers" of the Federal populations. Whether it should be based on numbers only, and if so, who should be counted in the enumeration, was a matter of the most profound concern in the convention which framed the Constitution, and one which came near defeating its formation. It was only after such a struggle as this that "numbers" was adopted as the basis of representation, and its importance and the duty of having strict regard to it is indicated by the history of its adoption.

Third. In making the apportionment on this basis of "numbers," there must be apportioned to each one of the several States that proportion or part of the aggregate membership of the House of Representatives which that State has of the aggregate representative population of the United States.

Fourth. The enumeration upon which the apportionment is based must be the one required to be taken within every term of ten years in such manner as the Congress shall by law direct.

#### The committee proceed:

Having regard, then, to these controlling requirements of the Constitution, the majority of your committee finds it difficult to discover any authority by which Congress shall assign to one of the several States an increase of representation on account of its increased numbers of representative population, and yet withhold it from other States shown to the same Congress, at the same time, and by the same known and historic events, to have had a similar or greater increase of Federal numbers. Indeed, this would be so plainly a disregard of the evident requirements of the Constitution and of the rules of equality

of representation secured by it to the several States, that it need not be considered by the committee; and so plain that this was not, in terms, demanded by the claimant or by the Representative from Tennessee before the committee. And hence it is that the claim of Tennessee in this case is vindicated and pressed upon the favor of the House upon the ground, mainly, that the claim of Tennessee is distinguishable from what could be demanded by the other late slave States. This distinction is rested, as we have already stated, upon the alleged fact that in 1865, during the recent rebellion, and in aid of its suppression, the slaves of that State were, by the voluntary act of the people, emancipated, enfranchised, and added to the representative numbers within such State, while in all the other States the emancipation and enfranchisement and addition to Federal population was, on the part of the people, involuntary and by the coercions of the war. Something is also claimed by Tennessee in virtue of the fourteenth constitutional amendment, as we have above stated.

In regard to this last claim, based upon the second section of the fourteenth amendment, it is sufficient for the purposes of the present inquiry to say that it can have no possible effect upon the conclusions reached in this case unless it be the effect of leading to a reapportionment of Representatives to each of the several States in the Union.

Neither in the fourteenth amendment nor in the voluntary emancipation of the slaves does the committee find justification for special action in the case of Tennessee.

#### As to the precedents, the majority say:

It is, of course, not only impossible to find a precedent in former legislation for a case like this, but it is equally impossible to resist the conclusion that if this addition to the representative population of the States is to be recognized as entitling one State to increased representation now, then the magnitude of the accession to the Federal population is so great as to compel a reapportionment of the entire representation in the House if any respect is to be paid to the rule that Representatives are to be apportioned to each State according to "numbers." In dealing with this addition to representative population the Congress is not dealing with mere fractions of a representative population, but with a population entitled to elect more than one-twentieth part of the entire membership of this House, In dealing with such a large and often controlling proportion of the vote of this House, it can not be that the Constitution permits Congress to exercise any discretions such as must be by necessity exercised in disposing of a mere fraction of a representative population in a State. And this is in accordance with all legislative precedents upon this subject. These precedents involve and sustain the following propositions, namely:

- 1. That "the Constitution evidently contemplated a census only once in ten years, and consequently a new apportionment, based upon such census, only once in ten years." (See Low's case, 1862, Contested Elections, 421, approved by the House without division.)
- 2. "The census and apportionment thus connected together in the Constitution, have been connected together in all subsequent legislation of Congress."
- 3. "There can be no such thing as one State represented according to one apportionment and under one census, and another State according to some other apportionment based on another census. The whole number of Representatives and the number for each State are both fixed by law, and by the same law. There cannot be one law for one State and another law for another." (See same case, p. 423.)
- 4. All former special acts of apportionment have been passed, at least professedly, to supplement the acts of general apportionment and to complete the equality of that apportionment to and among each and every one of the several States; and no act was ever passed which contemplated or recognized any other State as being left without its just proportion of representation as contrasted with what was accorded, by the special and the general law, to every other State. On the other hand, the proposed act in favor of Tennessee does propose to accord to Tennessee alone increase of representation upon a principle and on behalf of a population which would equally entitle other States to a like or greater increase, and yet it denies the increase to the other States.

After reviewing the precedents, especially the California case, the majority conclude:

It will be seen that each of them, instead of being a precedent for allowing a State increased representation upon a claim which applied with equal force in favor of other States, and which other States the special act left unprovided for, are cases where the act assumed that all the other States were already

more fully represented than the States provided for in the special act, and that such act was required to complete the equality of representation as between each one and all of the several States.

Of course, the numerous acts admitting new States, and giving them the representation their "numbers" entitle them to, are in no sense analogous to this proposed bill, because these acts did not leave any other States not equally represented with the new State. What is deemed by the committee the fatal objection to the proposed bill is that it gives Tennessee an additional Member on the ground of the addition of 110,287 to her representative numbers by the abolition of slavery, while it passes by, neglects, and refuses to give, and thereby denies, additional Members to the other States now represented in this House, who have added nearly ten times that number to their numbers by the very same event and fact which added them in Tennessee. It can not be successfully claimed that acts admitting new States and giving them their due representation, when every other State was fully represented, and represented equally with the newly admitted State, can furnish the slightest authority or a precedent for such a wrong as this one done by the proposed bill.

The committee also refer to the fact that the applicant was elected from the State at large, and criticise it as in violation of a law of Congress.

The minority of the committee<sup>1</sup> contended that the law asked for might with propriety be passed. After discussing the general laws on the subject of apportionment, they enumerate the special acts:

The act of February 25, 1791, chapter 9, gave 2 Representatives each to Kentucky and Vermont, until there should be "an actual enumeration of the inhabitants of the United States." By the act of June 1, 1796, chapter 47, Tennessee was admitted to the Union, with 1 Representative "until the next general census." The act of April 30, 1802, chapter 40, enabled Ohio to form a State, and gives her 1 Representative "until the next general census."

The act of April 8, 1812, chapter 50, admitting Louisiana, gives her 1 Representative "until the next general census." The act of April 19, 1816, chapter 57, enables Indiana to form a State government, and until the next general census entitles her to 1 Representative. She was admitted to the Union by joint resolution December 11, 1816. A similar act was passed for Mississippi March 1, 1817, chapter 33, and a similar joint resolution December 10, 1817; also for Illinois, April 18, 1818, chapter 67, and December 3, 1818; and for Alabama, March 2, 1819, chapter 47, and December 14, 1819.

The act of April 7, 1820, chapter 39, reduced the number of Representatives in the Seventeenth Congress from the State of Massachusetts to 13, and gave the remaining 7 to the recently formed State of Maine.

The general apportionment act of March 7, 1822, gave to Alabama 2 Representatives. The following year a special act, January 14, 1823, chapter 2, gave her an additional Member upon fuller information as to the number of her inhabitants. The act of March 6, 1820, chapter 22, enables Missouri to form a State government, with 1 Representative until the "next general census." She was admitted to the Union by joint resolution March 2, 1821.

The act of June 15, 1836, chapter 100, admitted Arkansas to the Union, with 1 Representative "until the next general census."

The legislation by which Michigan was admitted to the Union was attended with much difficulty. It will be found in the acts of June 15, 1836, chapter 99, of June 23, 1836, chapter 121, and of January 26, 1837, chapter 6, and its difficulties are illustrated by the debates of the two Houses. In the present purpose it is deemed sufficient to refer to section 3 of the act of June 15, 1836, which provides that as soon as the people of Michigan should have complied with certain fundamental conditions the President should announce the same by proclamation; and thereupon, without further action of Congress, "the Senators and Representatives who have been elected by said State" should be entitled to take their seats without further delay, nothing appearing in the statutes to indicate the number of Representatives.

The act of March 3, 1845, chapter 48, for the admission to the Union of Iowa and Florida, provides that "until the next census and apportionment" each State be entitled to 1 Representative. Iowa

<sup>&</sup>lt;sup>1</sup>Those concurring in the minority view were Messrs. David Heaton, of North Carolina, H. L. Dawes, of Massachusetts, John H. Stover, of Missouri, and S. Newton Pettis, of Pennsylvania.

was not, in fact, admitted under this act and not until near the close of the following year, act of December 28, 1846, chapter 1; but no further provision was made for her representation.

The joint resolution of December 29, 1845, chapter 1, admits Texas to the Union, with 2 Representatives until the next apportionment.

The act of August 6, 1846, chapter 89, enables the people of Wisconsin to form a State government, with 2 Representatives "until another census" and apportionment.

The act of September 9, 1850, chapter 50, admits California to the Union, with 2 Representatives until the next apportionment. Before that time the Seventh census was taken pursuant to the act of May 23, 1850, and California declares, by virtue of her ascertained numbers, to be still entitled to 2 and only 2 Representatives; and yet Congress thought proper, by act of June 2, 1862, chapter 91, for reasons appearing in the body of the act, to accord to her I additional Representative in the Thirty-seventh Congress.

The act of February 26, 1857, chapter 60, enables the people of Minnesota to form a State government, and provides for the taking of a census in the Territory with a view to ascertain the number of Representatives to which, as a State, she would be entitled. The act of May 11, 1858, chapter 31, admits her to the Union, with 2 Representatives "until the next apportionment."

The act of February 14, 1859, chapter 33, admits Oregon to the Union, with 1 Representative "until the next census and apportionment."

The act of May 4, 1858, chapter 26, providing for the admission to the Union of Kansas, under the Lecompton constitution, and that of January 29, 1861, chapter 20, admitting her under the Wyandotte constitution, both declare her entitled to 1 Representative "until the next general apportionment."

The act of December 31, 1862, chapter 6, erects a portion of the State of Virginia into the new State of West Virginia, with 3 Representatives, leaving unchanged the number to which Virginia is entitled.

The act of March 21, 1864, chapter 36, enables the people of Nevada to form a State government, with 1 Representative "until the next general census;" and, on the 19th of April, 1864, an act similar in all respects was passed by the people of Nebraska, under which acts both States have been admitted to the Union, completing the present number, 37.

These various acts have been collated at some pains, to show how completely the number of Representatives in the House has been contested, at the discretion of Congress, a discretion scarcely less absolute than that of each House over "the elections, returns, and qualifications of its own Members."

This is illustrated by the arbitrary, nay, artificial numbers, at which the ratio was successively fixed, by allowing Representatives for the fractions of the ratio, by the admission of new States with 1, 2, 3, or more Representatives according to their estimated populations, by reducing the representation of a State whose population had been reduced by the excision of part of her territory, by increasing the representation of States, as in the case of Alabama and California, when it was manifested that their population had been under estimated, and by determining the aggregate number of the House and requiring our executive officer to make the apportionment among the several States.

It is illustrated even more forcibly, if possible, by the act of March 4, 1862, chapter 36, which increases the number of Representatives from 233, the number established by the general law of May 23, 1850, to 241, giving to Pennsylvania, Ohio, Kentucky, Illinois, Iowa, Minnesota, Vermont, and Rhode Island, each I additional Member, to which they were not entitled under the general law.

In a word, these acts establish the general proposition that Congress has complete jurisdiction to adjust the representative numbers of the House, and has repeatedly and constantly exercised it at discretion, according to the varied equity of each particular case.

#### In conclusion the minority say:

The precedents cited as bearing upon the case are as weighty and significant as they are singularly numerous. It is believed they have not been or cannot be successfully met or explained away. These pointed examples of the unreserved exercise of legislative authority are in themselves a powerful warrant for the course which has been pursued by Tennessee. The vital point in the matter, however, is that Tennessee has not only followed "the line of safe precedent," but has conformed strictly to the true intent and meaning of the fourteenth article of the Constitution.

The fact that Tennessee happens to be the first State to claim the practical application of the inestimable rights conferred in said article should not be regarded as anomalous or involving a precedent of doubtful or "dangerous policy."

Objections founded upon any such reasoning are altogether likely to be speculative and fallacious, and lead to great injustice and wrong.

To admit the correctness of the somewhat sweeping statement that the admission of the claimant would be "a most dangerous precedent," would certainly be a most severe commentary upon many of the deliberate acts of the Congresses preceding the present.

In the present instance Tennessee claims no right or privilege she would not willingly concede to any other State having a similar record.

If, upon a fair investigation of the grounds upon which she bases her right to an additional Representative, it is found her cause rests upon merit and justice, and is sustained by unquestionable authority, her demand should receive a prompt and favorable response. To deny to her a manifest constitutional right upon the questionable and untenable objection that some other State may set up a similar claim, would surely afford abundant grounds for criticism, and come in direct antagonism with the policy heretofore maintained and pursued by Congress.

The report was not acted on by the House.

317. The Tennessee election case of John B. Rodgers in the Forty-first Congress.

The House denied the claim of a State to representation greater than the apportionment had given to her when the reasons for such claims applied to many other States.

The Clerk declined to enroll a person bearing regular credentials, but claiming to be a Representative in addition to the number apportioned to his State.

The House did not give prima facie effect to regular credentials borne by a person claiming a seat in addition to those assigned to a State by law.

On the organization of the House on March 4, 1869, Mr. John B. Rodgers, of Tennessee, appeared with credentials showing him to have been elected as Representative-at-large in Tennessee. The Clerk did not put him on the roll of Members-elect, nor did the House subsequently order the oath to be administered to him, the law apportioning Members not allowing a place for him in the Tennessee delegation. His credentials, however, were referred to the Committee on Elections, and on April 7 Mr. David Heaton, of North Carolina, presented the report of the majority of the committee. After citing the precedents in relation to apportionment, the report says:

The case of Tennessee is this: Accord ing to the census of 1860, the inhabitants of the United States, reckoning all free persons and three-fifths of all others, numbered 29,553,273. Divide by 241, the number of Members now composing the House, it gives 122,627 as the present representative ratio. Tennessee had 834,082 free inhabitants, white and colored, and 275,719 slaves, a total of 1,109,801. Three-fifths of her slaves, however, added to her free population, on the principle of the representative enumeration, made 999,514, by virtue whereof she has now 8 Representatives.

In February, 1865, she, by voluntary act, a popular vote, manumitted and emancipated her 275,719 slaves, nearly one-fourth of her population. Two-fifths of this number, 110,288, are thereby added to those already entitled to representation. This, with a previous representative fraction, leaves 128,785 for which the State has no Representative, counting only the population as it was in 1860. This excess of popular numbers over the number of her present Representatives is not the result of growth or natural increase, in which the several parts of the country are presumed to keep pace, at least until the contrary is demonstrated by the census, but of a great political act as conspicuous and distinctive as would be

<sup>&</sup>lt;sup>1</sup> First session Forty-first Congress, Journal, p. 5; Globe, pp. 38, 100.

<sup>&</sup>lt;sup>2</sup> House Report No. 12; 2 Bartlett, p. 941;

the annexation of a foreign territory containing so many people. For the purpose of this inquiry it is as if the boundaries of Maine were by treaty extended to embrace Nova Scotia, with 110,288 inhabitants. Is it equitable and just that they should be denied a Representative? The undersigned think not

Since the voluntary action of Tennessee in emancipating her slaves Congress has taken not only an important step toward settling the status of American citizenship, but also indicating a further proper basis of representation. On the 16th of June, 1866, what is known as Article XIV was submitted to the legislatures of the different States. On July 20, 1868, this article was formally proclaimed as a part of the Constitution of the United States by the Secretary of State. The second section of said article, to which particular attention is invited, reads as follows:

"Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This section, though general in its terms, was adopted with particular reference to the recently emancipated colored population, and is a declaration to the several States in which this population is found that if they are enfranchised the State shall be represented accordingly if not, representation shall be diminished. It either means this or is a mockery and means nothing.

As soon as possible after the promulgation of the proposed amendment—on the 16th of June 1866—Tennessee convened her legislature and ratified it. She then changed her franchise laws to conform to the spirit of this amendment by removing from all colored people within her boundaries all civil and political disabilities and conferring upon them the right to elect and to be elected to every office from the highest to the lowest. Having done this, and the fourteenth article having become valid as a part of the Constitution, what was before a claim for full and complete representation, resting in the discretion of Congress, became now an absolute constitutional right. For it must be borne in mind always that this action of Tennessee has been her own, independent and in advance of executive proclamations, constitutional amendments, and reconstruction acts. She has met all the conditions of the Constitution in a spirit of the most cheerful loyalty, and has created in her favor an obligation which can not be canceled by being denied.

Her legislature, viewing the matter in this obvious light, has by appropriate action provided for the election of an additional Representative. On the 3d day of November, 1868—the day of the late Presidential election, and the day designated by law for the election of Members of Congress in Tennessee—the people of that State, fully impressed that they were fairly entitled to an additional Representative, proceeded to elect, and did elect, the Hon. John B. Rodgers to the Forty-first Congress.

It was a matter of general notoriety in Tennessee, some time before it occurred, that such an election would be held. The people of the State were duly advertised of the fact by the act of the legislature and executive proclamations. The friends of the present applicant for a seat brought him forward as a candidate at a popular convention, unusually largely attended, at the capital of the State. The popular will was fully reflected at the polls in the fact that the applicant received nearly as many votes as were cast in that State on the same day for the prevailing Presidential electoral ticket. The places for voting in this case were the same as those at which votes were given by persons of different political proclivities for different candidates for Congress and candidates for electors for President and Vice-President. Returns of the result in different counties were made in due form to the secretary of state, as appears in official documents duly certified to. On these returns credentials in due form were issued.

The report urges that Tennessee has conformed to the requirements of the fourteenth amendment, and because she was the first State so to do should not count against her.

Therefore, the majority recommended the enactment of a law to increase the representation of Tennessee by one.

The minority of the committee call attention to the fact that the additional

seat may be claimed on the authority of no existing law, and deny that the facts and precedents justify the passing of such a law:

The provision of the Constitution of the United States which regulates representation is as follows: "Representation and direct taxes shall be apportioned among the several States which may be included within the Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative."

The second section of the fourteenth article of amendments to the Constitution relates to the same subject, and modifies, to some extent, so much of the above as relates to representation, and is as follows:

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

While these provisions differ as to the manner in which the representative numbers in the States shall be ascertained, they agree in providing that Representatives shall be apportioned among the States according to these numbers, and we have thus a definite and absolute rule established, according to which apportionment shall be made, and which forbids any assignment of Representatives to any State for any other reason, and which requires that if representation be given to one State equal proportionate representation shall be given to any other State similarly situated in respect of its representative numbers or population.

The provision of the Constitution first above quoted also provides the means for making the apportionment so required, by requiring that once in ten years an actual enumeration shall be made; and it would follow, by fair implication, that a reapportionment should only be made after such enumeration had shown its necessity. The practice of the Government has been uniformly in accordance with this view since the adoption of the Federal Constitution.

After each decennial census, and at no other time, a new apportionment of Representatives has been made among the States, and to each State according to its Representative population as fixed by the Constitution and ascertained by the census.

The legislation of Congress admitting new States forms no exception to this rule, since under the Constitution they may be admitted at any time, and by the provision above quoted each must have at least 1 Representative; but, subject to this last provision, the number of Representatives allowed to each new State has always been the number to which it was supposed to be entitled by its representative population, upon the ratio of the last preceding apportionment. The act of March 4, 1862, by which the aggregate membership of the House was increased from 233 to 241, and 1 additional member was given to each of the States of Ohio, Pennsylvania, Kentucky, Illinois, Iowa, Minnesota, Vermont, and Rhode Island, and also the acts of January 14, 1823, and of June 2, 1862, by which Alabama and California were each allowed a member in addition to the number previously apportioned to them also, are not exceptions, since the first was passed to give representation to large fractions of representative population which would otherwise be unrepresented, and the last two were intended to correct errors arising from insufficient census returns in the apportionment previously made to those States.

We have no right, therefore, under the Constitution and the uniform practice of our legislative history, to give representation to the 110,287 slaves in Tennessee, as shown by the census of 1860, who were excluded from making a part of the representative population of that State under the Constitution as it stood in 1860, but who, as freemen, if now living in that State, would, under the same Constitution, be a part of such representative number, without at the same time providing for equal representation to the 1,469,925 persons in other States, who, slaves then, have since become free. The fact that the slaves of Tennessee became freemen by the voluntary act of the people of the State, while those

of other States were made such without the assent and against the will of the people of those States, can not affect the question, since it is the fact of their freedom, and not the manner in which they became free, which alone has any legal significance in the case.

It is no answer to this objection that no other State than Tennessee asks for this additional representation. It is the duty of Congress to apportion Representatives among the States according to their respective numbers, and this whether the States ask for it or not; and to give additional representation to Tennessee, while withholding it from States equally entitled to it, and upon facts equally within our knowledge, would be a violation of this duty.

The passage of such a general law at this time would not be proper, since the adoption of the four-teenth amendment has given a new rule for ascertaining representative numbers, and Representatives are required to be apportioned among the several States according to those numbers. No enumeration heretofore made of the people of the United States would enable us to ascertain the present representative numbers of the several States. Such an enumeration, however, must be made under the Constitution before the close of the next year. Then, and not till then, can an apportionment be made such as the Constitution now requires.

There is another consideration to which the minority deem it proper to call attention, and which seems to answer fully the equitable ground for this claim, urged on the part of the State of Tennessee.

The next census will undoubtedly show a very large increase of the population of the United States. This increase has been added, almost entirely, to the population of the States which were loyal during the war, and were not slave-holding States at its commencement. During the war the immigration to this country was excluded from the Southern States by the blockade, and by the presence of our armies, and since has been almost equally excluded by the distracted condition of those States.

The loss of life and the check to the increase of population from other causes is also believed to have been much greater in the States which were the immediate seat of hostile operations. We do not believe that anyone will seriously question that the apportionment of 1862, based upon the census of 1860, gives to each of the lately slave-holding States a larger proportionate representation than they would be entitled to upon an enumeration made at the present time, and according to the rule by which such representation must now be made. To yield the claim of Tennessee would increase this disproportion, and would be unjust to the States which were faithful to the Union through all its trials and who by their fidelity saved the Republic.

Therefore the minority recommend that the question be deferred until after the next census.

The report in this case was never acted on, but on March 1, 1871,<sup>1</sup> the House discharged the committee from further consideration of the subject and agreed to a resolution compensating Mr. Rodgers for his expenditures in presenting his case.

318. The Virginia election case of Joseph Segar in the Forty-first Congress.

After the division of Virginia the House recognized a division of the old representation between the two States, without specific provisions of law.

The House declined to give prima facie effect to credentials regular in form, relating to a seat, in addition to those to which the State was entitled.

After reconstruction the credentials of all the Virginia delegation were referred before the bearers were admitted.

At the second session of the Forty-first Congress the Members-elect of the Virginia delegation were not permitted to take the oath until their credentials were examined by the Committee on Elections. Then all were sworn in except Mr.

<sup>&</sup>lt;sup>1</sup>Third session, Journal, p. 449; Globe, p. 1801.

Joseph Segar, who had been elected for the State at large, as was made plain by his credentials:

To all whom it may concern:

This is to certify that at an election held in and for the State of Virginia by the voters registered under the act of Congress of March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States," and the act supplementary thereto and amendatory thereof, upon the question of ratifying or rejecting the constitution framed by the convention called under the authority of said laws, and at which election it was provided by the 2d section of the law of April 10, 1869, that the voters of said State may vote for and elect members of the general assembly of said State, and all the officers of said State provided for by the said constitution, and Members of Congress, Joseph Segar was duly elected at large as a Representative to the Congress of the United States.

Given under my hand, at Richmond, Virginia, this 9th day of September, 1869.

ED. R. S. CANBY,

Brevet Major-General, U. S. A., Commanding First Military District.

On March 29, 1870, Mr. Halbert E. Paine, of Wisconsin, from the Committee on Elections, to whom Mr. Segar's credentials had been referred, submitted their report.

Mr. Segar, as one of his claims, had insisted that the certificate ought to be conclusive as to his right to the seat "unless in case of contest or of the allegation of fraud or of palpable clerical mistake." The report says:

This assumes, of course, that the seat itself is provided for by law. But that is the very question, and the only question in this case, and to that question the committee are constrained to give a negative answer

Eight Representatives from Virginia had already been seated, and Mr. Segar would, if seated, make the ninth. The report of the majority of the committee thus sets forth the case:

The census act of May 23, 1850, contains the following provision:

"Sec. 24. And be it further enacted, That from and after the third day of March, one thousand eight hundred and fifty-three, the House of Representatives shall be composed of two hundred and thirty-three members, to be apportioned among the several States in the manner directed in the next section of this act."

And by the twenty-fifth and twenty-sixth sections of the same act it is provided that, upon the completion of each enumeration of the inhabitants of the United States, the Secretary of the Interior, after ascertaining from the census returns the representative population of the United States, and of the several States, shall apportion the Representatives among the several States, and "shall, as soon as practicable, make out and transmit, under the seal of his office, to the House of Representatives, a certificate of the number of Members apportioned to each State under the then last enumeration." Under this act the census of 1860 was taken, and the Secretary of the Interior transmitted his certificate to the House.

Under this apportionment the Secretary of the Interior allotted to Virginia 11 Representatives.

The report continues:

On the 31st day of December, 1862, an act was passed providing for the admission of the new State of West Virginia, to consist of 48 counties of Virginia, and to have, until the next general census, 3 Representatives in the House of Representatives of the United States, which act was, by its own terms, to take effect at the expiration of sixty days from the date of a proclamation of the President therein provided for.

<sup>&</sup>lt;sup>1</sup>Second session Forty-first Congress, House Report No. 51; 2 Bartlett, p. 810; Rowell's Digest p. 253.

Subsequently the following joint resolution was adopted:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress hereby recognizes the transfer of the counties of Berkeley and Jefferson from the State of Virginia to West Virginia, and consents thereto.

"Approved March 10, 1866."

The returns of the census of 1860 show that the representative population of the present State of Virginia was a little less than eight-elevenths of the entire representative population of the old State, including the counties now constituting West Virginia. While, however, the representative population of the counties constituting the present State of Virginia was not quite sufficient to entitle the State to 8 of the 11 Representatives apportioned to the old State, it was considerably more than sufficient to entitle it to 7 of them, so that the assignment of 8 to Virginia and 3 to West Virginia was the nearest practicable approach to an absolutely just distribution of the representation.

In no case have the acts providing for the readmission of the rebel States to the Union embraced any legislation changing or fixing the number of Representatives of the readmitted State. In every case the State has been readmitted with the number of Representatives fixed by the certificate of the Secretary of the Interior transmitted to the House under date of July 5, 1861.

The number of Representatives assigned to the old State of Virginia by the apportionment of 1861 was, as has been already stated, 11. The number assigned to West Virginia by the act of admission was 3. In the opinion of the committee, the present State of Virginia is by law entitled to only 8 Representatives, and the law requires that those shall be chosen by single districts.

The minority views were presented by Mr. Job E. Stevenson, of Ohio, the committee having been nearly evenly divided. The minority say—

Under the apportionment of Representatives in Congress, on the census of 1860, the State of Virginia was entitled to 11 Members. No law has been enacted affecting this apportionment, unless the reconstruction acts relative to that State can be so constructed

The acts and proceedings creating and admitting the new State of West Virginia are silent on this question. They fix the number of Representatives from the new State, but do not touch the topic of representation from Virginia.

It seems to be assumed that because the new State was formed from the side of the old, therefore the act of Congress giving West Virginia the right to 3 Representatives reduced the quota of Virginia from 11 to 8; but we respectfully submit that no such important conclusion can be properly or safely implied from laws containing neither syllable nor letter to support it; and that such latitude of construction would overthrow all rights founded upon statutes.

If the apportionment on the census of 1860 applies at all, it must be accepted in its term, and entitles the State of Virginia to her full quota of 11 Representatives, instead of 9 elected or 8 admitted.

A technical objection may be based upon the provision of the act of June 25, 1842, reenacted in subsequent acts:

"That in each State entitled in the next and any succeeding Congress to more than one Representative, the number to which such State is or may be hereafter entitled shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which said State may be entitled in the Congress for which said election is held, no one district electing more than one Representative."

If this provision were deemed applicable, we might answer the objection by showing that it has never been observed, and is not now observed by this House.

In the Twenty-eighth Congress, the first after this provision was enacted, the House admitted 20 Members at large from the States of New Hampshire, Georgia, Mississippi, and Missouri, respectively, and voted that they had a right to their seats. (See Con. Elect. Cases, 2, p. 47.)

In the Thirty-fifth Congress, in 1858, the House decided "That the election of members by general ticket instead of by district is not a bar to admission to seats in the House." (See case of Phelps and Cavanaugh, Con. Elect. Cases, 2, p. 248.)

That case was from a newly admitted State, and therefore analogous to this of the readmission of a reconstructed State with changed boundaries. But the most striking case is that of the State of Illinois, which has been, ever since the Thirty-eighth Congress, and is now, represented in this House by

Member at large notwithstanding this provision, the proviso allowing her a Representative at large having expired with the Thirty-eighth Congress. See act of July 14, 1862, which contains the following:

"And provided further, That in the election of Representatives to the Thirty-eighth Congress from the State of Illinois, the additional Representative allowed to said State by an act entitled 'An act fixing the number of the House of Representatives from and after the third day of March, eighteen hundred and sixty-three,' approved March fourth, eighteen hundred and sixty-two, may be elected by the State at large, and the other thirteen Representatives to which the State is entitled by the districts, as now prescribed by law in said State, unless the legislature of said State should otherwise provide before the time fixed by law for the election of Representatives therein."

But it is not deemed necessary to dwell upon this point, because it seems obvious that the general act is not applicable to a reconstructed State when a change of circumstances calls for special action.

The claimant further urged that he was entitled to admission because of provisions of the law of Congress taken in connection with certain ordinances of the constitutional convention of Virginia. These ordinances districted the State and provided for a ninth Representative at large. Unlike the constitution itself the ordinances were not ratified by the people.

Claimant urged that the Congress by approving generally the proceedings of reconstruction in Virginia, of which the ordinances were a part, had approved the Representative at large. The majority of the committee denied this, holding that the chain of law was not perfect.

Another point was answered as follows:

3. The claimant cites the following provision of the act which took effect on the 11th day of March, 1868:

"Sec. 2. And be further enacted, That the constitutional convention of any of the States mentioned in the acts to which this is amendatory may provide that, at the time of voting upon the ratification of the constitution, the registered voters may vote also for Members of the House of Representatives of the United States, and for all elective officers provided for by the said constitution; and the same election officers who shall make the return of the votes cast on the ratification or rejection of the constitution shall enumerate and certify the votes cast for Members of Congress.

And he insists that the authority conferred by this act carries with it the power, first, to district the State, and, secondly, to fix the number of its Representatives; and that these two powers stand on the same footing. But the power to district a State, in accordance with the Federal apportionment, is, by section 4 of Article I of the Constitution of the United States, conferred upon the State, subject to the control of Congress, whereas the power to fix or alter the number of Members of the House of Representatives of the United States is vested exclusively in the Federal Government, and even if there is doubt whether a State can exercise the power to district its territory for the election of Representatives otherwise than through its ordinary legislature, there is no doubt that a State can not exercise the power to fix the size of the Federal House of Representatives, whether through its ordinary legislature, or its constitutional convention, or in any other way.

As to the argument that Virginia was entitled to additional representation because she had many thousands of newly enfranchised citizens, the majority of the committee denied that this fact entitled Virginia to representation at once, since the same theory would give immediately increased representation to the other reconstructed States.

The majority reported the following resolution:

Resolved, That Joseph Segar is not entitled to a seat as a Representative of the State of Virginia at large in the Forty-first Congress of the United States.

On July 11<sup>1</sup> the report was considered in the House. After debate a proposition was offered by the minority declaring Mr. Segar entitled to the seat. This was disagreed to—ayes 31, noes 85.

The resolution of the majority declaring Mr. Segar not entitled to the seat was then agreed to without division.

319. Reference to the claim of Nebraska for additional representation.—On February 24, 1883,<sup>2</sup> the House finally disposed of the claim of Nebraska for additional representation on account of alleged defects in the census on which the apportionment was based. The House found that its committee had been imposed on and took action to bring the authors of the imposition to the attention of the authorities.

<sup>&</sup>lt;sup>1</sup> Journal, p. 1216; Globe, pp. 5450-5455.

<sup>&</sup>lt;sup>2</sup> Second session Forty-seventh Congress, Record, pp. 3247-3252.